

AUG 5 1940

CHARLES ELMORE CROPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 305

FROST LUMBER INDUSTRIES, INC.,
Petitioner,
versus

REPUBLIC PRODUCTION COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT,

And

BRIEF IN SUPPORT OF PETITION.

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May It Please the Court:

The petition of Frost Lumber Industries, Inc., a corporation organized under the laws of the State of Missouri, duly authorized to do business in the State of Louisiana, with respect shows:

(A)

That petitioner in this suit seeks to recover one-half ($\frac{1}{2}$) of the minerals other than gas on six non-contiguous blocks of land in Union and Ouachita Parishes, Louisiana, for convenience designated Blocks A, B, C, D, E and F, free of a servitude to one-half ($\frac{1}{2}$) of the minerals which had been created in favor of Federal Petroleum Company, a Louisiana corporation, predecessor in title of the defendant, Republic Production Company, a Delaware corporation.

On January 12th, 1917, the Frost-Johnson Lumber Company (whose name in 1925 was by charter amendment changed to Frost Lumber Industries, Inc.) and the Union Sawmill Company of Arkansas, an affiliated company, sold and conveyed to the Federal Petroleum Company, one-half of the minerals under some 180,000 acres of land in Louisiana, including the lands in the six blocks in Union and Ouachita Parishes. Under Louisiana law this sale created a mineral servitude in favor of the said Federal Petroleum Company. (*Wemple v. Nabors Oil & Gas Company*, 154 La. 483, 97 So. 666; *Lee v. Giauque*, 154 La. 491, 97 So. 669).

On December 23rd, 1920, the parties to the foregoing contract sold and conveyed all of the gas and gas rights lying in and under the same acreage to the Union Power Company. Petitioner claims that by the sale of the gas to the Union Power Company, the parties thereto amended and modified the original servitude of one-half ($\frac{1}{2}$) of the minerals so as to exclude from it and make a new servitude as to gas, and that the original servitude as to one-half ($\frac{1}{2}$) of the remaining minerals created on January 12th, 1917, has been lost by operation of the prescription, *liberandi causa*, of ten (10) years non-use applicable in the absence of development of said minerals. Authorities *supra*. Defendant, while admitting the creation of the servitude of one-half ($\frac{1}{2}$) of the minerals, in favor of its predecessor in title on January 12th, 1917, denies that the effect of the joint sale by the interested parties of the gas to the Union Power Company in December of 1920 created a new and separate gas servitude. It insists that the sale of the gas to the Union Power Company insofar as its predecessor in title is concerned, was a mere as-

signment of an interest in the original servitude, and that the drilling of gas wells by the Union Power Company and its assignee on certain of said Blocks in the year 1924 and thereafter, were timely operations, interrupted the running of the liberative prescription and kept the original servitude to one-half ($\frac{1}{2}$) of the minerals created in January of 1917 in full force and effect. The defendant likewise contends that the sale of the gas in December of 1920 was an acknowledgment of the original servitude sufficient to interrupt the running of the liberative prescription. Judgment was rendered in the District Court sustaining defendant's contentions and upon appeal was affirmed by the Circuit Court of Appeals for the Fifth Circuit.

(B)

The decision of the Circuit Court of Appeals is in direct conflict with that of the Supreme Court of Louisiana in *Frost Lumber Industries, Inc., v. Union Power Company*, 162 So. 37, construing the identical contracts under Louisiana law and your petitioner contends that this Court has jurisdiction to review the judgment by virtue of this conflict.

(C)

The questions presented are:

1. Was a new servitude created by the joint sale of gas to the Union Power Company in the year 1920 by the Frost Interests, owners of the land, and by the Federal Petroleum Company, owner of a mineral servitude thereon, who together represented perfect ownership?
2. Was the recital in the preamble to the deed conveying the gas in 1920, setting forth the proportionate

ownership of the vendors in the minerals, a sufficient acknowledgment of the original mineral servitude in favor of the Federal Petroleum Company, to interrupt the running of the liberative prescription of ten years non-use?

(D)

The reason relied on for the allowance of a writ of certiorari directed to the Circuit Court of Appeals for the Fifth Circuit is that its decision on a question of applicable local law is in direct conflict with applicable local decisions.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and of all proceedings in the cause numbered and entitled on its docket No. 9438, Frost Lumber Industries, Inc., appellant, versus Republic Production Company, appellee; and that said judgment of the Circuit Court of Appeals affirming the judgment of the District Court be reversed by this Honorable Court; and that petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just; and this your petitioner will ever pray.

FROST LUMBER INDUSTRIES, INC., Petitioner,

By: SIDNEY L. HEROLD and

ELMO P. LEE,

Shreveport, Louisiana, Attorneys.

